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ARE ADMISSIONS COMPETENT EVIDENCE IN DIVORCE CASES UNDER § 2260, CODE OF VIRGINIA?

It is believed that the majority of the readers of this article will answer the above question in the affirmative before looking for the writer's conclusions, and in justification of seeming to think that the matter will even bear discussion, it may be well to premise what will be said with the statement that the Court of Appeals of West Virginia in the case of Trough *v.* Trough, 59 W. Va. 464, 53 S. E. 630, has held that such admissions are incompetent, and that the former rule in Virginia was changed by the case of Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340. Coming closer home, it is known to the writer that at least one Circuit Court Judge in Virginia has recently held the same thing, after full argument, considering himself bound by what was conceived to be the decision in the Hampton Case, supra. With deference, it is submitted that such is not the law.

Bailey *v.* Bailey, 21 Gratt. 43, was the first divorce case which ever came to the Virginia Appellate Court. The grounds on which the wife, in this case, sought a divorce from her husband were adultery, cruelty and abandonment. The charges of adultery and cruelty, however, were not sustained by the evidence, and the ground on which the divorce was granted was that of abandonment or desertion. In this case the effect of § 9, Chapter 109, Code 1849 (now § 2260, Code 1904) on the competency of the *admissions* of the parties as evidence tending to show guilt of the offence charged was squarely presented and decided by a unanimous court. In the opinion delivered by Judge Christian he says that the evidence *"is in the main made up of letters,* of both the plaintiff and defendant, filed and relied upon by the plaintiff;" and that defendant's counsel insisted "that these letters are but the declarations and *admissions of the parties,* and cannot, by the express terms of

the statute, be regarded as evidence in the case." The Court then states that the object of our divorce statutes was

"to prevent a divorce from being obtained *by the collusion of the parties*. All that was intended by the 9th section (above quoted) was to put in the form of a statutory enactment, that principle which had been well settled by the ecclesiastical courts of England and the whole current of decisions of the courts of the States of the Union * * *, to wit, that a divorce would never be granted merely upon the consent, or on the default of the party charged, but only on proof of the cause alleged."

That the principle above mentioned was one—

"for the protection of public morals and the sanctity of the marriage relations. These were the paramount objects of the rule, and these were the paramount objects of the statute, enforcing a well settled rule of law. But surely it could never have been the intention of the legislature to change the rules of evidence, when the suit was a suit for divorce, and provide a *different mode of proving facts* in such a case."

The court then points out that if this be not true then everything that the parties write or say would be *admissions* of the parties, "and under the operation of the words of the section 'or otherwise' must be excluded;" that, under such a construction, letters, in a suit for divorce on the ground of adultery, of the guilty party to the paramour, could not be read in evidence in behalf of the injured party, and the same result would follow in a divorce suit for desertion, though the letters of the defendant might show the most deliberate and complete desertion. The court then concludes:

"These would be the unjust and absurd results to which such a construction of the statute would inevitably lead. We cannot give it such a construction but we think that this section was merely intended to prevent decrees for divorce upon the collusion of the parties, or upon the consent or default of the party charged. We are of opinion that the letters of the parties may be admitted in evidence in a suit for divorce (except where it is shown they were written by collusion for the purpose of obtaining a divorce) just as in any other case, for the purpose of proving, or as tending to prove, facts pertinent to the question which the court is called upon to decide, to have precisely the same weight as in other cases. The question which the court was called upon to decide in this case was whether

James A. Bailey had abandoned and deserted his wife. One of the constituent elements of the offence of desertion being the intent to desert, in the mind of the offender, we think the letters of the parties may be read as evidence of that intent."

It is thought that the language of the above opinion is too broad to admit of any question but that the court meant just what it said when it declared that the statute did not change the rules of evidence, and that evidence of *bona fide* admissions had "precisely the same weight as in other cases." The writer sees no ground on which to base the suggestion, which he has heard made, that the opinion limits the admissions to those cases where such declarations merely give *color* to *acts,* showing with what *intention* and *quo animo* the act was done.

In Carr *v.* Carr, 22 Gratt. 168, the court said of the Bailey Case (on p. 172):

"The fact of desertion by the husband. proved almost exclusively by the letters of the parties, was considered by the court as satisfactorily established, and the divorce was decreed."

In Latham *v.* Latham, 30 Gratt. 313, the Bailey Case was cited approvingly as follows:

"As was said in Bailey *v.* Bailey, 21 Gratt. 43, 90, the purpose of these provisions (i. e., the provisions of Code, § 2260) was to prevent a decree being obtained *by collusion of the parties*, and not to change the rules of evidence or to provide a different mode of proving the facts from that pursued in other cases."

So, in Cralle *v.* Cralle, 79 Va. 182, the court, speaking through Judge Lewis, said, in commenting on certain admissions by the husband:

"Similar admissions on his part are testified to by other witnesses who were examined by the defendant. And these admissions are not only competent evidence in support of the averments of the answer, but are evidence of the most satisfactory character. 2 Bishop on Mar. and Div., § 664; Bailey *v.* Bailey, 21 Gratt. 43; 1 Minor's Insts. 268."

In the above case Judge Lacy filed a dissenting opinion in which he seems to take the view that § 2260 *excludes* admissions, though he does not notice the Bailey Case and it is some-

what difficult to tell from a reading of his opinion just what he did consider the law to be on this point.

The rule above announced in the Virginia cases would also seem to be the general law, both independent of statute and on the construction of similar statutes in other States. In 9 Am. & Eng. Enc. Law (2 Ed.), pp. 844-846, it is said that the confessions and admissions of the parties are admissible unless excluded by statute; that the same rule was observed in the ecclesiastical courts, though it was and is the rule that confessions or admissions are not *alone* sufficient to support a decree of divorce, but must be corroborated by other evidence. Such objection as there is goes to the *weight* of the evidence and not to its *admissibility*. It is further said that:

"Our divorce statutes prohibiting the courts from granting divorces upon the confessions and admissions of the parties are declaratory of the common law and are construed in conformity with the decisions of the ecclesiastical courts."

And, in a note to the above work, on page 844, the cases of King *v.* King, 28 Ala. 315, and Baker *v.* Baker, 13 Cal. 87, are cited for the proposition that a statute providing that "no decree can be rendered on the confession of the parties, or either of them" does not *exclude* the confessions, but renders them insufficient to support a decree when they are the only evidence; though when corroborated by confirmatory circumstances and conduct which repeal the idea of collusion they may be made the basis of a decree. In a note on page 845 of the same work it is said:

"In Stone *v.* Stone, 3 Notes Cas. 278, Dr. Lushington said that a confession is 'a species of evidence of the highest kind, provided always that it is accompanied with certain requisites—first, undoubted proof that the admissions were made; second, that the expressions were clear and distinct; and, third, that the admissions were sincere.'"

See in accord 2 Bishop on Marriage and Divorce (5th Ed.), §§ 240-251. The last mentioned author, in § 250, speaks of certain State statutes enacting that confessions be not at all received as a "very unwise provision * * * whereby a party is sometimes cut off from using the most conclusive evidence, to the utter denial of justice."

Our local text writers seem to treat the question as foreclosed. Mr. Minor in his Institutes, 1 Minor's Insts. (4th Ed.), 294, says of Code, § 2260:

"The object of these provisions is to prevent a divorce from being obtained by the *collusion of the parties;* and they are no more than an enactment of principles which have always prevailed in matrimonial causes, as we have seen. (Ante, p. 281, lk; Bailey *v.* Bailey, 21 Gratt. 50; 2 Burns' Eccles. L. 504-'5.) Neither the common-law rule nor the statutory enactment *excludes* proof of the admissions and statements of the parties. Their only effect is to prohibit a sentence from being founded *wholly* upon such admissions. When collusion is proved not to exist, admissions, whether verbal or contained in letters, are peculiarly satisfactory evidence; and especially is it so when the letters were written, or the verbal statements made, without reference to the controversy touching the divorce. (Bailey *v.* Bailey, 21 Gratt. 50, 51; Cralle *v.* Cralle, 79 Va. 186.)"

The edition of Minor's Institutes from which the above quotation was taken was published in 1891, and the preface thereto is dated October 5, 1891. The Hampton Case was decided December 4, 1890, so it is presumed that Mr. Minor had seen that case when he wrote the matter quoted. An examination of the table of cases in the above volume of the Institutes shows that Mr. Minor nowhere cites the Hampton Case.

The second edition of Barton's Chancery Practice was published in 1899. In vol. 1, at page 342, it is said, in speaking of § 2260:

"The purpose of these provisions of the statute was to prevent a decree being obtained by collusion of the parties, and not to change the rules of evidence or to provide a different mode of proving the facts from that pursued in other cases. Hence it has been held that the letters of the parties except where they are proved to have been fabricated for the purpose, are admissible in evidence in behalf of either party."

The Virginia cases cited by the author are the Bailey Case and the Cralle Case. He nowhere in this work cites the Hampton Case.

In 7 Va. Law Register 134, there is an editorial in which attention is called to the Hampton Case, also to 1 Min. Inst.

268; Bailey *v.* Bailey, 21 Gratt. 43, and Cralle *v.* Cralle, 79 Va. 182. Of the Hampton Case it is there said:

"The decision itself, and the fact that it is not in accord with the well-established rule in Virginia, are probably now well known to the profession; yet, as it may still mislead the unwary, it may be well to call attention to it."

The editorial writer then quotes the authorities above mentioned holding otherwise. It is evident from the language above used that the writer did not think the Hampton Case changed the former law.

Let us then examine the case of Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340, which, as was noticed in the beginning of this discussion, has given rise to the only doubt expressed on this subject. This was a suit for a divorce by the husband, the wife's adultery being the ground alleged. The material evidence, as set forth in the opinion of the court, delivered by Judge Fauntleroy, was as follows: A letter from the wife purporting to admit the adultery as charged in the bill was filed with the bill; the testimony of complainant's mother, and others, was taken to prove the admission by the defendant of her adultery with the brother of the complainant; the co-respondent brother denied the adultery as did also the defendant in her answer, she stating that the alleged admissions were secured by duress and fraud. A witness testified as to improper conduct between the defendant and co-respondent, such as her sitting in his lap, and going upstairs in the barn with him. Three negro witnesses testified as to various improper actions between the co-respondent and the defendant occurring some years before the institution of the suit. It was also in evidence that the complainant had sold all of his personal property and had induced his wife to join in a deed conveying away his land, and had collected the money before he made any accusation against the defendant. Also that he had acknowledged to several witnesses that he had "scandalized" and had "undermined" his wife, to get her to confess and to criminate the co-respondent. The circumstances of fraud and coercion in obtaining the admissions of the defendant were evidently paramount in the mind of the judge who delivered the opinion of the court, and

much space is given over to a discussion of the worthlessness of extorted confessions, the court also speaking of "the letter wrung from her in the calamity of her situation, and dictated by the cunning promises and brutal threats and coercion of her accuser."

It is apparent from what has been detailed of the evidence that a decision of the court excluding "admissions" obtained under such circumstances would have been amply justified (and was indeed called for) by the exceedingly questionable and sinister circumstances under which the so-called "admissions" were obtained. But the court did not content itself by excluding or giving no weight to the admissions on these grounds, but (as is submitted) went beyond the necessities of the case and delivered a flat-footed dictum that § 2260 of the Code rendered admissions of the parties *incompetent*. The following is all that the court has to say on the subject of the written and verbal admissions:

"These should have been excluded, under the law. Section 2260, p. 561, Code 1887: 'Such suit shall be instituted and conducted as other suits in equity, except that the bill shall not be taken for confessed; and whether defendant answer, or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise.' 1 Minor, Inst. 256, says: 'It is an established maxim that a divorce is never to be decreed for adultery (or, indeed, for any other cause), upon the confession of the parties, merely, without auxiliary proofs; experience having shown that such a practice is productive of collusion, and other flagitious frauds.'"

It is hardly necessary to say that the quotation made from Professor Minor does not sustain the holding. The latter is not speaking of the effect of our statute, and confines himself in the sentence quoted to divorces grounded "upon the confession of the parties, *merely, without auxiliary proofs.*" The evidence in the Hampton case, as has been above shown, contained abundant "auxiliary proofs." It may also be noted that the second edition of 1 Min. Inst., from which the quotation on page 256 is made, has, on page 268, the identical statement of the law set out above in the quotation from him in this article.

No reference whatever is made to the earlier Virginia cases

construing § 2260. It is submitted that what is said as to the effect of § 2260, Code, was entirely unnecessary to a decision of the case then before the court and was a *dictum* pure and simple. The quotations made in the opinion from text writers show that an admission or confession obtained by fraud, duress or fear, in every class of cases, as expressed by Greenleaf in the quotation inserted in the opinion, "comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected." This is well settled law. In 1 Am. & Eng. Encl. Law (2 Ed.), at page 716, it is said:

"Evidence of an admission is not excluded in a civil case because it was made under legal compulsion; but the rule is otherwise if the person making it was imposed upon or under duress."

So in a later work, 2 Encl. L. & P., at page 31, it is said:

"Admissions must be voluntary. If made under duress they are inadmissible. And the jury cannot inquire whether they were made because of the duress or because they were true."

It seems obvious to the writer, moreover, that this *dictum*, with its *apparent* lack of thorough consideration, and its failure to notice the prior decisions of the same court, or even a case holding otherwise when the court had the same personnel, is deprived of even any *persuasive force*, and casts no doubt upon what is conceived to be the correct and well established doctrine.

In the footnote to Latham *v.* Latham, 30 Gratt. (Va. Rep. Anno.) 307, the annotator says:

"In Hampton *v.* Hampton, 87 Va. 148, a letter from defendant was excluded, on the ground, however, of fraud and duress."

However, we have seen that, while the *decision* was probably based upon the ground named, the *opinion* purported to construe § 2260. To give to this case the effect of rendering all admissions in divorce cases *incompetent testimony* would be to murder the Bailey, Carr, Latham and Cralle cases without "due process of law," since the court certainly did not "proceed upon inquiry," "hear before it condemned," or "render judgment only after trial."

In the case of Cralle *v.* Cralle, 79 Va. 182, hereinbefore quoted

from, it is true that the admissions of the husband were not being used against him as the *grounds of a divorce for the wife.* He had his decree for divorce, obtained on order of publication, and she, by a petition afterwards filed, was seeking alimony. The point, however, is that the same judges who decided the Hampton Case cite the Bailey Case and Minor's Institutes with apparently the fullest approval, and the page of the Institutes cited is the one where the author states that § 2260 does *not exclude* proof of admissions. It may be further mentioned that it is difficult to see how, if the *strict letter* of the statute were to be followed, *any* admissions, even though they went to *defeat* the action, could be read, as the language of the enactment is that the case shall be heard *"independently* of the admissions of *either* party in the pleadings or otherwise." By thus sticking in the bark the absurd result would be that though the complainant in a divorce suit had by his own statements irrefutably shown that he had no meritorious cause of action he might nevertheless go unchallenged through the courts. Of course, such a procedure would be subversive of justice, would violate that principle so often adverted to by the courts that the State is in all divorce cases deeply interested and a *quasi* party intent upon seeing that *real cause* shall exist before a marriage is dissolved, and would do violence to elementary principles of evidence. It is not believed that even if a court followed the Hampton Case it would have the hardihood to be consistent to this extent.

Let us see what has been the course of decision in West Virginia on their similar statute. It may be stated that the question herein discussed does not seem to have been squarely presented to the West Virginia Appellate Court until the case of Trough *v.* Trough, hereinafter noticed, came before them. But that the doctrine of the Bailey Case was fully recognized there seems plain. In Martin *v.* Martin, 33 W. Va. 695, 11 S. E. 12, admissions of both the husband and wife were testified to and used against them, though the court does say that "even if the statements of her husband, of which she speaks, be accepted as evidence, she condoned his intimacy," etc. In Tillis *v.* Tillis, 55 W. Va. 198, 46 S. E. 926, the following language of the court would seem to indicate that it had some doubt as to the correct-

ness of the Bailey Case. Speaking of the husband in the case, the court says:

"Admissions from his own lips clearly prove it. Whatever construction may be properly put on the language in § 8, c. 24, of the Code of 1899, that 'the cause shall be heard independently of the admissions of either party in the pleading or otherwise;' whatever we may think of the correctness of the case of Bailey *v.* Bailey, 21 Gratt. 43, holding that said statute does not render admissions, except by collusion, incompetent evidence on which to obtain a divorce—we cannot question their admissibility as evidence to defeat a divorce," quoting Cralle *v.* Cralle, 79 Va. 182.

The West Virginia statute on this subject seems to be identical with ours. Of course, neither the Bailey Case nor the Hampton Case are binding authorities in West Virginia, for the reason that the construction contained in them was enunciated after West Virginia had become a separate State, and after our statute had been there adopted. It is interesting, nevertheless, to note that the eminent West Virginia text writer, Prof. Charles E. Hogg, in his work entitled "Equity Principles," adopts as the correct construction that of the Bailey Case, and dis inguishes and criticises the Hampton Case. In the above work, § 497, the author says:

"Our statute provides that a divorce cause must be heard independently of the admissions of either party thereto, either in the pleadings or otherwise. (Code, Chapter 64, § 8.) The reading of this statute might reasonably create the impression that in a suit for divorce the admissions or declarations of the parties or either of them could not be received in evidence at all. Indeed, there is one decision which in construing the statute from which ours is taken does seem to hold that way. (Hampton *v.* Hampton, 87 Va. 148, 12 S. E. Rep. 340. See dissenting opinion of Lacy, J., in Cralle *v.* Cralle, 79 Va. 182, 188-195.) But this decision was rendered as late as 1890 and the court seems to hold, in the course of its opinion, that the bare admissions of the defendant in the suit are insufficient to support a decree of divorce, and further, that the admissions there were extorted by duress. The opinion does not support the syllabus. It does not refer to the previous decisions construing this same statute and reaching a contrary conclusion. (Bailey *v.* Bailey, 21 Gratt. 43; Latham *v.* Latham, 30 Gratt. 307; Cralle *v.* Cralle, supra.)"

The author then quotes voluminously from the Bailey Case, and continues:

"We have taken this elaborate extract from the opinion in this case because of the importance of the subject to which it relates. The question here discussed has been before several of the courts of the Union, and the most of them hold that the acts and declarations and admissions of the parties may be received as evidence in the suit, just as may be done in other suits in chancery and actions at law.

"Our conclusion from the authorities is that section eight of chapter sixty-four of our Code is merely intended to guard against collusive divorces, and to prevent decrees of divorce from being taken on the mere confessions or admissions of the parties or either of them, standing alone and unsupported by any evidence independent of such confessions or admissions; but that the statute never was intended to entirely exclude such evidence as incompetent and not to be considered at all with the other evidence in the cause."

In a footnote to part of the text above quoted he says:

"The construction of this statute in Bailey *v.* Bailey is approved in Latham *v.* Latham and Cralle *v.* Cralle, supra. In Martin *v.* Martin, 33 W. Va. 695, 11 S. E. Rep. 12, the statements and declarations of the parties are taken and treated as evidence, but no question is raised as to their admissibility. So in Burk *v.* Burk, 21 W. Va. 445, 454, the plaintiff's admissions were treated as competent evidence in the cause, and commented upon by the court."

However, in Trough *v.* Trough, 59 W. Va. 464, 53 S. E. 630, the West Virginia court, treating the matter as *res integra,* without citation of any former West Virginia cases in which such evidence had been admitted without objection, rather slurringly referring to the earlier Virginia cases *contra* and treating Hampton *v.* Hampton as settling the law, decided that their statute banned such evidence wholly, and that under it admissions were incompetent. Of the Virginia cases the judge delivering the opinion of the court says:

"One case in Virginia on this statute seems to hold otherwise. Bailey *v.* Bailey, 21 Gratt. (Va.), 43. I have never been able to see with certainty what it means. Does it mean to say that admissions in letters only are competent? Cralle *v.* Cralle, 79 Va. 182, only goes to the effect that admissions may be used to de-

feat a divorce. Latham *v.* Latham, 30 Gratt. (Va.) 307, only says that defendant is entitled to a denial in his answer—that the act never designed to eliminate that pleading so far as to refuse the benefit of its denial. Hampton *v.* Hampton, 87 Va. 148, 12 S. E. 340, overrules Bailey *v.* Bailey by holding under the statute that 'evidence that the defendant admitted the charge (of adultery) and a letter from her purporting to admit it, are inadmissible.' "

It would be embarrassing to any court to sift out the ***admissions*** from the ***acts*** of the parties in divorce cases, and to adhere to the technical and literal construction given to the statute by the Trough Case. The West Virginia court would not seem to be precisely "practicing what it preaches" even now.

In Duncan *v.* Duncan (W. Va.), 72 S. E. 742, admissions of both parties seem to have been freely relied on, without objection by counsel, or adverse comment of the court. The husband was granted a divorce from the wife on the ground of her desertion. Among other admissions relied on by the court are the following (page 742):

"Not only is it (i. e. the desertion) distinctly charged in the bill, and *admitted in the answer,* but it is fully proven," etc.

And (same page):

"she deserted him, with the *declared purpose* never to again return as his wife."

The italics are mine. We do not dispute that the West Virginia court has the right to decide its own statute as it pleases. But when that court undertakes to say that Hampton *v.* Hampton has changed the law in *Virginia,* we beg to demur, to protest, and to enter a most unqualified dissent. It is believed that what has been said shows this not to be the case. The question seems never to have been directly adverted to by our Court of Appeals since the Hampton Case, but the doctrine of the Bailey Case has been frequently recognized in the unchallenged *use* of admissions in divorce proceedings in numerous cases both before and since the ***pronunciamento*** in Hampton *v.* Hampton.

In Myers *v.* Myers, 83 Va. 806, 6 S. E. 632, the court says, in speaking of the defendant:

"That in October, 1885, he admitted to his wife's brother

that he had kicked her, * * * and, after thus admitting that he had kicked her, said he did not care who knew it, and that he would kick her or any other woman under similar circumstances."

See also Davenport *v.* Davenport, 106 Va. 736, 56 S. E. 562, where admissions of the husband on cross-examination are relied upon by the court in granting the wife a divorce.

In Lurty's Curator *v.* Lurty, 107 Va. 466, 59 S. E. 405, there is what seems to be an implied recognition of the doctrine of the Bailey Case. This was not a divorce suit, and certain letters from a wife to her husband touching the cause of their estrangement, in her action, on his death, to recover on his implied promise to pay her money, were held inadmissible against her because they were *privileged communications* both under the common-law and Code of Virginia, § 3346a, subsec. 3. The court says:

"The contention that the letters are admissible by authority of Bailey *v.* Bailey, 21 Gratt. 43, Carr *v.* Carr, 22 Gratt. 168, and Latham *v.* Latham, 30 Gratt. 325, finds ready answer in the fact that these were suits for divorce, of which class of cases Professor Minor remarks: 'Neither the common-law ruling nor the statutory enactment (Code Va. 1904, § 2260) excludes proof of the admissions and statements of the parties. Their only effect is to prohibit a sentence from being founded wholly upon such admissions.' 1 Min. Inst. (3d Ed.) 297."

In Haynor *v.* Haynor, 112 Va. ——, 70 S. E. 531, it appears in the opinion that the complainant wife sent a message to her husband to the effect that she had abandoned him and gone to her former home, and did not intend to live with him any longer.

In Lee *v.* Lee, 113 Va. ——, 72 S. E. 689, the court in granting the husband a divorce on the ground of desertion said that the evidence showed that the wife had not lived with her husband for over three years "and has declared her purpose never to return to his home, though he has tried to induce her to do so."

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